



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Brown County Human Services, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 175424

Pursuant to petition filed July 11, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Brown County Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Monday, August 22, 2016 at 10:15 AM at Green Bay, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Brown County Human Services

Economic Support-2nd Floor

111 N. Jefferson St.

Green Bay, WI 54301

Respondent:

██████████
██████████
██████████

█

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii

Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Brown County.
2. On November 12, 2014, the Respondent completed an ACCESS application in which he indicated living with "██████████" age 54 and "██████████" age 24. The application contained a penalty warning indicated the Respondent could be disqualified from the FoodShare program for violating the rules of the program. The Respondent electronically signed the application, indicating that he understood the penalties for providing false information or violating the rules. (Exhibit B)

3. On July 15, 2016, Brown County prepared an Administrative Disqualification Hearing Notice alleging that the Respondent violated the rules of the FoodShare program on an unspecified date, at an unspecified location, by using a Quest Card belonging to [REDACTED] (Exhibit C)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on August 22, 2016. [REDACTED] testified that the Respondent was advised of the date, time and location of the hearing in an Administrative Disqualification Hearing Notice that him at an address on [REDACTED] in Green Bay. [REDACTED] testified that this was the most recent address that child support enforcement had. [REDACTED] further indicated that there was no returned mail.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear. As such, it is found that the Respondent did not have good cause for his non-appearance.

What is an IPV?

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or

2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the Agency's Burden of Proof?

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this

burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the Respondent committed the IPV.

The Merits of the Agency’s Case

In the case at hand, the agency asserts that the Respondent used an EBT card belonging to [REDACTED], and that he was not entitled to do so, since he was not part of [REDACTED]’s household/assistance group. The agency contends [REDACTED] was incarcerated at the time in question.

First, it is questionable whether the notice provided by the agency is adequate, as it does not provide the date of the alleged violation, nor any information regarding where the violation took place. A notice of violation should state what rule was violated, who committed the violation, when the violation was committed, where it was committed and how. It is difficult to defend against an alleged violation, when one does not have any of this information.

Second, the agency’s case is short on evidence.

In order to prove a case such as this the agency needs to provide:

- 1) Documentation showing the members of the Respondent’s household to show who was included (i.e. her most recent SMRF or renewal; a confirmed assistance group history / summary, etc.)
- 2) A print out showing the existence of no other authorized buyers.
- 3) An EBT usage screen showing when the card was used.
- 4) Documentation showing that the Respondent was incarcerated during the time in question.
- 5) Proof that “[REDACTED]” was the person using the card on the dates in question.

Here, the agency has not provided any documentation showing who was included in [REDACTED]’s household. It did not provide an EBT usage screen showing when the card was used. It did not provide any documentation showing [REDACTED] was incarcerated at the time in question.

The agency relied upon the hearsay statements of [REDACTED] and [REDACTED] to [REDACTED] to prove [REDACTED] gave the Respondent the card to use and that the Respondent did not use the card to purchase food for [REDACTED]’s assistance group, which included a child. However, there is nothing about [REDACTED]’s or [REDACTED]’s hearsay statements, nor the circumstances in which they were made that lend an indicia of reliability to their statements. Indeed, the Respondent is the party opponent here, not [REDACTED] or [REDACTED].

[REDACTED] indicated that the agency could have requested copies of the video footage he reviewed, as well as the audio recording of his interview with [REDACTED]. However, it did not do so and did not present that evidence at the hearing.

Based upon the foregoing, it is found that the county agency has not met its burden to prove the Respondent committed an IPV.

CONCLUSIONS OF LAW

The county agency has not met its burden to prove the Respondent committed an IPV.

NOW, THEREFORE, it is ORDERED

That IPV case number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

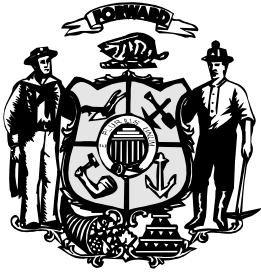
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 8th day of September, 2016

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Bay Lake Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



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The preceding decision was sent to the following parties on September 8, 2016.

Brown County Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@co.brown.wi.us